IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.2767 OF 2005
IN
CRIMINAL APPEAL NO.1210 OF 2004

Birendra Kumar Kantaprasad Rai ...Applicant
(Org.Appellant)

Vs.

Superintendent of Customs,
Air Intelligence Unit Mumbai & Ors. ...Respondents

Shri Anil Lalla i/by M/s. Lalla & Lalla for the Applicant.
Shri D.N. Salvi for the Respondent No.1.
Ms M. H. Mhatre, A.P.P. for the State.

CORAM : A. S. OKA, J.
DATE : SEPTEMBER 16,2005.

P.C.:

1. Heard the Advocate appearing for the Applicant. The Applicant has been convicted by the impugned Judgment and Order for contravention of Section 8(c) of the Narcotic Drugs and Psycotropic Substances Act, 1985 (hereinafter referred to as said Act of 1985) for the offence punishable under section 21 read with section 23 of the said Act of 1985. The Applicant has been sentenced to suffer on each count rigorous imprisonment for ten years and to pay fine of Rs. One lakh each and in default in payment of fine to suffer further rigorous imprisonment for two years each. For the offence punishable under section 29 read with section 8(c) of the said Act of 1985, Applicant and co-accused are sentenced to suffer

rigorous imprisonment for ten years each and to pay a fine of Rs.One lakh each. The Applicant has been in custody from 15th January, 1998. The learned Special Judge directed that the substantive sentences shall run concurrently.

2. The learned Advocate appearing for the Applicant placed reliance on Judgment and Order dated 03rd November, 2004 passed by this Court in Criminal Application No.4323 of 2004 in Criminal Appeal No.1194 of 2004 by which the co-accused in a companion case Captain Zairus Dastur was ordered to be enlarged on bail. The Advocate appearing for the Applicant submitted that for the reasons which are set out in the said order, the Applicant deserves to be enlarged on bail. The learned Advocate for the Applicant submitted that the investigating machinery has not recovered any narcotic drugs or psycotropic substances from the possession of the Applicant and or at his instance. He submitted that reliance is placed by the learned Special Judge only on retracted confessional statement recorded under section 108 of the Customs Act read with section 67 of the Narcotic Drugs and Psycotropic Substances Act, 1985 and there was no independent corroboration to the said statements. He submitted that as number of incriminating

circumstances are not put to the Applicant in his statement under section 313 of the said Code, serious prejudice has been caused to the Applicant. It was lastly submitted that the Applicant has been in custody for last more than seven years and the total punishment awarded is ten years.

3. The learned Counsel appearing for the Respondent No.1 submitted that there is more than enough evidence on record to prove the guilt of the Applicant and hence, no case is made out for grant of bail. He submitted that this Court cannot exercise the power of suspending the implementation of sentence in an Appeal challenging the order of conviction and sentence under the provisions of the Narcotic Drugs and Psycotropic Act, 1985.

4. I have considered the submissions. At the outset, it must be noted here that there is already a finding recorded against the Applicant by the learned Special Judge of the proof of guilt after a full trial. The findings recorded by the Special Judge on the basis of the evidence on record cannot be ignored as admittedly this Application will be governed by the constraints imposed by section 37 of the said Act of 1985 on the powers of this Court to grant bail.

Reliance placed on the Judgment and Order in case of an accused Zairus Dastur may not help the Applicant as strictly speaking, claim for parity cannot be based on the said order as the Applicant therein is not the accused in the same case. The allegation of the prosecution is that contraband was found at the bottom of bag carried by Captain Dastur. In the facts of the case, this Court found that the evidence on record was not sufficient to establish that the said Captain Dastur had knowledge about the fact that there was a contraband in his bag.

5. Considering the facts which are peculiar to the case of Captain Dastur this court granted bail. In the present case, the role ascribed to the Applicant is not identical with the role which was ascribed to the said Captain Dastur. The question whether the material on record is sufficient to justify the conclusions drawn by the Special Judge will have to be examined at the time of Final Hearing of the Appeal. Assuming that certain incriminating circumstances are not specifically put to the Applicant in his statement under section 313 of the said Code, whether any prejudice has been caused to the Applicant is a matter which will have to be examined at the hearing of the Appeal. Viewed with

the perspective of the Section 37 of the said Act of 1985, on the face of the findings recorded by the learned Special Judge, it is impossible to come to the conclusion that in all probability the Applicant will have to be acquitted on the basis of the material on record. In my view, there is no merit in the Application and the same deserves to be rejected. As the Appeal is assigned to this Court, it will be necessary to fix the same for directions.

6. Accordingly, I pass the following order:

: O R D E R :

i) The Application is rejected.

ii) The Office is directed to place the Criminal Appeal for directions on 26th October, 2005.

JUDGE